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AUG 2 1943
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 221

J. CLYDE DEAN, DOING BUSINESS AS RED RIVER BARGE LINE, OWNER OF THE TUG DORIS DEAN,
Petitioner,

versus

BARGE TRANSPORT COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT,

And

BRIEF IN SUPPORT THEREOF.

L. J. BENCKENSTEIN,
GEORGE W. BROWN, JR.,
SELIM B. LEMLE.

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BARGE TRANSPORT COMPANY.

PETITION FOR WRIT OF CERTIORARI.

J. Clyde Dean, doing business as Red River Barge Line, owner of the tug DORIS DEAN, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit in the above entitled case, entered on May 21, 1943.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATEMENT.

This is an admiralty proceeding growing out of a collision between the tug DORIS DEAN and her tow and the barge BUTTE.

The Diesel tug DORIS DEAN was descending the Calcasieu River in the nighttime, shoving ahead of her the barge DEAN 8, when she collided with an unlighted barge, the BUTTE, which was moored to the bank. The DORIS DEAN and her tow, barge DEAN 8, are both shallow draft vessels, the former drawing only 6′ of water (R. 89) and the latter about 3′ 6″ (R. 89). The Calcasieu River at the point of the accident is about 600′ wide and there is a 200′ steamship channel about the middle of the river (R. 101), but the DEAN and her tow, because of their shallow draft, did not have to navigate this channel, and on the night in question, which was hazy, the tug and her tow were proceeding down their left hand bank so that if the fog closed in suddenly, as was not unusual in that vicinity (R. 90), they would be in sight of land. The barge BUTTE was moored to the bank with her outboard side extending about 35′ out in the river, and the up-river outboard corner of the barge BUTTE was struck by the port forward corner of the barge DEAN 8. While visibiity was not good, the navigator of the DORIS DEAN testified that he was able to see for a quarter of a mile a light on an oil wharf just upstream from the barge BUTTE (R. 122), but that he didn't see the barge BUTTE because she had no light on her. (R. 166).

Barge Transport Company, as owner of the barge BUTTE, proceeded against the DORIS DEAN to recover

$1548 damages arising out of the collision, and J. Clyde Dean, doing business as Red River Barge Line, the owner of the tug DORIS DEAN and her tow, barge DEAN 8, cross-libelled, claiming $100 damage suffered by the barge DEAN 8 in the collision.

The District Court found for libellant and dismissed the cross-libel. Its findings of fact and conclusions of law will be found in the record, page 30 ff.

The United States Circuit Court of Appeals for the Fifth Circuit affirmed the decree of the District Court. Its opinion rendered May 21, 1943, not yet officially reported, will be found in the record at page 205 ff. An application for rehearing was filed (R. 209) and refused.

The Court of Appeals held the Diesel tug DORIS DEAN was at fault for proceeding down her own port bank of the Calcasieu River, citing in support thereof the case of *The Standella*, 108 F. (2d) 619, decided by that Court and in which it held a vessel at fault for proceeding on the left hand side of a narrow channel in violation of Article 25 of the Inland Waters Rules, which is the Act of Congress of the United States of June 7, 1897, c. 4, Sec. 1, 30 Stat. 101, 33 U. S. C. 210. We submit that in so holding the Court erred. This Act is not applicable to the Calcasieu River, the navigation thereof being governed by Section 4233 of the Revised Statutes of the United States, as amended, and by the rules and regulations supplementing these statutory rules, adopted by the Board of Supervising Inspectors of the United States pursuant to Section 4412 of the Revised Statutes of the United States, the Cal-

casieu River being one of those rivers which flow into the Gulf of Mexico, and all of such rivers being expressly excepted from the purview of the Inland Waters Rules.

We further submit that even if Article 25 of the Inland Waters Rules, known as the Narrow Channel Rule, were applicable to the waters in which the collision occurred, the rule does not apply to a shallow draft vessel such as the DORIS DEAN and her tow and does not apply to a collision between a vessel under way and a moored vessel.

We further submit that the Court erred in holding in effect that the fact that the DORIS DEAN with her tow kept to her own left hand side of the channel was a fault *per se* which rendered her liable for this collision, because the cause of the collision was the failure of the BUTTE to show a light, and the presence of the DORIS DEAN and her tow on their own left hand side of the channel was a condition, not the cause, of the collision with the BUTTE.

Finally, we submit that the Court erred in failing to hold that the admitted failure of the BUTTE to display a light was a statutory fault which caused or contributed to the collision between the DORIS DEAN and the BUTTE, and in failing to hold either that the BUTTE'S failure to display a light caused the collision and rendered the BUTTE solely responsible therefor, or, in the alternative, that it was a contributing cause of the collision, rendering the BUTTE equally liable therefor with the DORIS DEAN.

QUESTIONS PRESENTED TO THIS COURT.

Based on these errors, the questions presented are these:

First: Does Article 25 of the Inland Waters Rules, which is the Act of Congress of the United States of June 7, 1897, c. 4, Sec. 1, 30 Stat. 101, 33 U. S. C. 210, apply to the Calcasieu River? If it does not, then the DORIS DEAN was not guilty of a fault by proceeding with her tow down her own left hand bank of the River.

Second: If the Narrow Channel Rule is applicable to the Calcasieu River, then

(a) does the rule apply to a shallow draft vessel such as the DORIS DEAN, and

(b) does the rule apply to a collision between a moored vessel and one under way?

Third: Does the fact that a vessel is proceeding out of the proper channel *per se* render that vessel liable for a collision in the nighttime with an unlighted vessel which is required by statutory rule to show a light, and excuse that statutory fault of the offending vessel and deprive the moving vessel of any right to recover either whole or divided damages against the unlighted vessel?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

The fundamental failure of the Circuit Court of Appeals for the Fifth Circuit to apply the proper rules to the navigation of the Calcasieu River has established a dangerous principle, and particularly dangerous at this

time because of the extraordinary and ever growing movement of oil and other war materials in that river and in the other inland waterways of the Gulf of Mexico subject to the same navigation rules and principles.

The error of the Court of Appeals in holding that in the Calcasieu River a shallow draft vessel may not navigate out of the channel established for the navigation of deep draft vessels and may not navigate on her own left hand side of the river is serious indeed, for if this rule be applied, proper, safe and expeditious navigation will be greatly hampered and impeded.

Of the very greatest importance to navigation interests is the question whether or not they may expect their vessels to navigate in the nighttime with the assurance that vessels moored in the intracoastal waterways of the Gulf of Mexico will be lighted, and the corollary rule whether or not they are obligated to light their own vessels when they moor them in these waterways.

It is also of great importance to correct the erroneous decision of the Court of Appeals holding that the mere fact that a vessel was proceeding on her own left hand side of the channel was a fault *per se* where she collided with a moored vessel. In other circuits it has been held that where a vessel proceeding on the left hand side of the channel came into collision with a stationary vessel, the fact that the moving vessel was on the left hand side of the channel was merely a condition and not the cause of the collision, and the contrary holding of the United States Circuit Court of Appeals for the Fifth Circuit is in con-

flict with two of the most recent decisions of the United States Circuit Courts of Appeal on the subject. *The Deutschland*, 90 F. (2d) 454, decided by the United States Circuit Court of Appeals for the Second Circuit, and *Merchants' & Miners' Transportation Company v. Nova Scotia SS. Company*, 40 F. (2d) 167, decided by the United States Circuit Court of Appeals for the First Circuit.

Finally, it is of the greatest importance to have determined whether there is to be applied in the Fifth Circuit a rule that where one vessel is found at fault for a collision, another vessel which has committed a grave statutory fault which may have contributed to the collision, is to be excused without even having the fault determined or its connection with the collision examined into, in contraventon of the rule elsewhere of universal application, that where a vessel is guilty of a violation of a positive statutory rule, in order to exonerate herself from liability, she carries the burden of showing that such failure not only did not cause or contribute to the collision but that it could not have done so, established by Your Honors in *The Pennsylvania*, 86 U. S. (19 Wall.) 125, and reannounced by you and applied repeatedly in *Lie v. San Francisco & Portland SS. Co.*, 243 U. S. 291; *Belden v. Chase*, 150 U. S. 674; *The Britannia*, 153 U. S. 130; *Richeleau Navigation Co. v. Boston Insurance Co.*, 136 U. S. 408, and *The Martello*, 143 U. S. 464. The United States Circuit Court of Appeals for the Fifth Circuit previously followed and only recently abandoned this rule. Among other cases decided by that Court we cite *Johnson v. United States*, 4 F. (2d) 102, decided in 1925, our reason for selecting this example of the Fifth Circuit's former acquiescence in the rule being that that case has many

points in common with the case at bar. That case involved a collision in the channel of the Mississippi River between a tug with two barges in tow and a schooner. The Court found the schooner at fault on grounds not pertinent to this discussion and also held the tug at fault for violating the narrow channel rule and for failing to show proper lights on the barges in her tow. There were displayed no green and red side lights on either barge and only one white light instead of two white lights on the rear barge, as required by the pertinent rule. The Court said:

> "There were no green and red side lights on either barge, and only one white light, instead of two, was on the rear barge, and the tug was in the center of the channel. The burden was on the appellee to show, not only that its violations of these rules probably did not contribute to the collision, but that they could not have done so. The Pennsylvania, 19 Wall. 125, 137, 22 L. Ed. 148; Belden v. Chase, 150 U. S. 674, 14 S. Ct. 264, 37 L. Ed. 1218; The Martello, 153 U. S. 64, 14 S. Ct. 723, 38 L. Ed. 637; The Britannia, 153 U. S. 130, 14 S. Ct. 795, 38 L. Ed. 660; Lie v. San Francisco & Portland S. S. Co., 243 U. S. 291, 37 S. Ct. 270, 61 L. Ed. 726. If the barges had been equipped with proper lights, in all probability there would have been no collision."

The United States Circuit Court of Appeals for the Fifth Circuit first departed from this universal rule in the case of *The Standella*, 108 F. (2d) 619, decided in December of 1939. In that case the motor vessel STANDELLA was proceeding in Galveston Bay in a fog on the left hand side of a narrow channel, in violation of Article 25 of the Inland Waters Rules, which was there applicable, when she collided head on with another vessel, the ANDREW, pro-

ceeding in the opposite direction, which the STANDELLA claimed was guilty of fault for excessive speed in a fog and failing to stop. The Court held the STANDELLA solely at fault and excused the ANDREW for running too fast in a fog and failing to stop on the apparent theory that if the STANDELLA had not been on the wrong side of the channel she couldn't have hit the ANDREW regardless of the ANDREW'S fault. That is patently an application of the "but for" rule and a flagrant violation of the rule that where a vessel is guilty of a statutory fault which contributes to a collision, in order to exonerate herself, she must show not only that her fault did not cause the collision but it could not have done so, and marks a departure from the universal rule which had been theretofore applied by the Fifth Circuit Court of Appeals in a number of cases, including *Johnson v. United States*, supra.

Having departed from the universal rule and having been guilty of an error in that regard in the STANDELLA, the United States Circuit Court of Appeals for the Fifth Circuit now repeats that error in the case at bar by refusing to consider the liability of the BUTTE for her statutory fault in failing to display a light, and in failing to hold either that that fault caused the collision or at least contributed to it, and not assessing at least half damages against the BUTTE.

The decision of the United States Circuit Court of Appeals in this case is in conflict with its own prior jurisprudence in *Johnson v. Unted States*, supra, with the jurisprudence of the Supreme Court of the United States above cited, and also with the jurisprudence of other circuits, as

an example of which we cite *General Seafoods Corporation v. J. S. Packard Dredging Co.*, 120 F. (2d) 117, decided by the United States Circuit Court of Appeals for the First Circuit. Unless a writ of certiorari is granted by Your Honors and the conflict resolved by the correction of this patent error, there will result the perpetuation of the error in the jurisprudence of the Fifth Circuit.

In connection with this petition for writ of certiorari, petitioner is filing herewth a brief in support thereof, which it requests be considered a part of this petition.

WHEREFORE, it is respectfully submitted that the petition for a writ of certiorari directed to the United States Circuit Court of Appeals for the Fifth Circuit should be granted.

L. J. BENCKENSTEIN,
GEORGE W. BROWN, JR.,
SELIM B. LEMLE.

August, 1943.